The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 1 of 2019

B E T W E E N:

MORRIS O'BRIEN

Appellant

- v -

THE QUEEN

Respondent

Before: **Clarke, President**
Bell, JA
Smellie, JA

Appearances: Victoria Greening, Chancery Legal Ltd., for the Appellant; Maria Sofianos, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **19th November 2019**
Date of Judgment: **29th November 2019**

JUDGMENT

Complaint regarding competence of counsel – Test of fairness of process and safety of verdict

BELL JA:

Introduction

1. On 7 February 2019, the Appellant was convicted by the unanimous finding of a jury of the charge of rape, contrary to section 323 of the Criminal Code 1907

(pre-amendment). On 3 May 2019, the Appellant was sentenced to eight years' imprisonment.

2. The case is an unusual one in part because of the length of time between the commission of the offence, which occurred when the complainant was 15 years old, and the date of the trial itself. The complainant was 45 years old when the incident was first reported to the Bermuda Police Service, so some thirty years after the alleged rape. The Appellant was 23 years old at the time that the alleged offence had been committed, and, by way of a further twist, was engaged to be married to a relative of the complainant at the material time.

3. The complainant had been raised in what was described as a traditional Portuguese household, involving very strict rules, which included a prohibition on young men even entering the home if no adult was present.

4. The prosecution case, based on the complainant's statement to the Police, was that on a night some time in either September or October 1988, when the complainant's mother was at work and her sister was sound asleep upstairs, the complainant, who (unlike her sister) was a light sleeper, heard a knock on the door of the family home. She went downstairs to answer the door, and when she opened it, she found that it was the Appellant who had knocked. She told him that her mother was not at home and that her sister was asleep upstairs, and that therefore no one was allowed in the house. She asked him what he wanted, and at this point, instead of answering, the Appellant pushed the door open, forcing his way through, gripped the complainant by both arms, and, using the complainant's words from her statement to the Police, "walked me towards the living room". He then forced her to the ground, removed her pyjamas and the pants she was wearing underneath, and the rape then took place. The complainant described the pain she felt in her vagina (she said was a virgin at the time) as a sharp pain like a paper cut, and said that her stomach hurt as if

she had been punched, and she couldn't speak. She said that at some point she blacked out, and when she came to, the Appellant had left.

5. In the event, the complainant became pregnant (said by her to be in consequence of this alleged rape) and gave birth to a son on 28 June 1989. The attending doctor opined that conception would have occurred around 10 October 1988, or at least within three days either side of that date.

6. It was not until a month or so after the birth of the child, and after being repeatedly questioned by her mother as to the identity of the child's father, that the complainant revealed the circumstances of the rape to her mother. A decision was made, at least by the mother, not to make a report to the Police. The complainant was still of relatively tender years, and presumably bound in practical terms to follow her mother's lead. However, the complainant's mother did confront the Appellant, warning him not to come around the house, a warning which the Appellant apparently did not comply with, something which in turn led to the complainant's mother instructing a lawyer to secure a restraining order, preventing the Appellant from visiting the home. For reasons which are not now of concern, DNA paternity tests were conducted in 2017, and on 31 August 2017 it was confirmed that the Appellant was the biological father of the complainant's child born in June 1989.

7. The Appellant denied having had sexual intercourse on the occasion and in the manner which formed the basis of the charge. He did however assert that he had engaged in consensual sexual intercourse with the complainant on some three separate occasions during or about the same period. Given the finding of the paternity test, which was formally admitted for the purpose of the trial, the Appellant obviously could not deny that he had had sexual intercourse with the complainant during the relevant period. Those three occasions were said by the Appellant to have occurred, first, at the bathroom of the complainant's family home, when he said that he was leaving the bathroom, and found the

complainant outside the door. She made advances to him and they then had sex in the bathroom. The second occasion was said by the Appellant to have occurred when the whole family had gone to what the Appellant described as a small beach at the back of the RA Club. He and the complainant had been swimming, when he said she had started kissing him, and they had proceeded to have sex, while in the water. He said that the third occasion again took place at the complainant's family home, when the Appellant had been there for a sleepover. The boys and girls had slept separately, but in the combined living/dining room area, when the Appellant said the complainant had come to where he was, laid down beside him, and the two again had sex.

Available Material

8. The only witness whose evidence was transcribed for the proceedings in this Court was the complainant. The Appellant relied upon his statement to the Police as effectively being his evidence in chief, but beyond that the evidence can only be established from the trial judge's summation. This necessarily means that there may be gaps in the completeness of the evidence before this Court, and one of these was in relation to the dates of the three occasions when the Appellant said he had had sex with the complainant.

Grounds of Appeal

9. Ignoring for present purposes those grounds which were withdrawn before the hearing, the grounds which remained were as follows:

    i) **Ground 7** – The learned judge erred in his direction to the jury as to the good character of the Appellant in that the judge told the jury effectively that they *may* take such evidence into account rather than they *should, must* or *ought* so to do in considering the credibility and/or the propensity of the Appellant

ii) **Ground 9** – The Appellant's trial counsel failed to follow the Appellant's instructions when cross-examining the Crown's witnesses, resulting in an incomplete defence being available to the jury when considering their verdict.

iii) **Ground 10** – The Appellant's trial counsel failed to make it clear to the jury what the Appellant's defence was in relation to the offence charged. He cross-examined the complainant about *"statutory rape"* which is an offence unknown to the laws of Bermuda.

iv) **Ground 11** – The Appellant's trial counsel failed to advise the defence witnesses not to sit in the public gallery of the court during the trial prior to giving evidence.

v) **Ground 12** – Cumulatively, the Appellant's trial counsel was negligent in failing to put the Appellant's defence properly before the jury.

10. In the event, the ground of appeal relating to the judge's direction on good character was withdrawn after the complaint dealing with the competence of counsel had been argued first. This was because when the Appellant gave his evidence before this court, he was questioned by Ms. Sofianos about his criminal record and he confirmed that he had a conviction for the removal of a cycle, dating back to 1982, when he would have been 17 or so, for which offence he had been put on probation. The Appellant confirmed that this had been canvassed before the trial judge, although the judge had not referred to it when giving his direction on good character to the jury.

11. I pause to comment that quite apart from the merits of the complaint as to the manner in which the judge had put the issue to the jury (the use of the word *may* instead of *must*), it seems unlikely to me that the Appellant should properly have been treated as a person of good character. His defence necessarily involved

an admission that he had had sex with the complainant when she was under the age of 16, and so he would have been guilty of the charge of unlawful sexual intercourse, had such a charge been filed at the time. The Appellant acknowledged in his Police interview that he knew that a 15 year old girl could not give consent. As an aside, in the Police interview, the questioning officer had used the expression "statutory rape", one which also featured in the complaints against counsel.

The Competence of Counsel

12. This covers grounds 9, 10 and 11, which together identify three separate areas where it is said that the Appellant's counsel at trial, Kamal Worrell, was negligent in his conduct of the Appellant's case to such an extent that his failures taken together amount to a miscarriage of justice and an unfair trial, and that the Appellant's conviction was consequently unsafe.

Failure to Follow the Appellant's Instructions in the Cross-examination of Crown Witnesses

13. The Appellant's complaints in this regard were set out in detail in a document which was exhibited to an affidavit which he swore on 30 September 2019. In relation to each of the complainant, her sister and their mother, he prepared highly detailed notes, headed in each case "Summary of Evidence Notes", prepared with reference to their Police statements, and indicating that the notes constituted the Appellant's rebuttal to what each of them had said.

14. The Appellant's affidavit evidence was to the effect that he had prepared his notes when he received disclosure from the Crown, and had given those notes to Mr Worrell. He said that he and Mr Worrell had had consultations where they jointly went through the evidence and his notes, and discussed his defence in detail, and that the Appellant had given Mr Worrell "clear instructions on how to cross-examine the Crown witnesses". The affidavit then set out a number of ways in

which the Appellant said that Mr Worrell had failed to cross-examine the Crown witnesses despite having been given clear verbal and written instructions.

15. The Appellant's evidence to the Court seemed to minimise the extent of the collaboration between client and counsel. He said that he had met with Mr Worrell at his law offices only twice, that they had had no discussion at the start of the trial and not at all in the holding cell, although he subsequently recalled that they had twice had discussions at the end of the day. He indicated that when he had given his detailed notes to Mr Worrell, the latter told him that he had taken all the Appellant's advice into consideration. The Appellant felt strongly that his continuing familial relationship over the years with the complainant demonstrated that he had not raped her in 1988. Generally, he felt that his was a case in which credibility was going to be important, and for this reason it was critical that his counsel should discredit the complainant, with particular reference to the fact that their interaction at family gatherings over the subsequent years was inconsistent with the 1988 rape. There were other areas where the Appellant wanted Mr Worrell to cross-examine the complainant regarding her sexual history with the Appellant's relative, and whether she had boyfriends at about the time of the alleged rape, including one by the name of Gary. For his part, Mr Worrell stated that in relation to his discussions with the Appellant as to how the case should be run, they had agreed "every step of the way". He also indicated that if the Appellant had given him directions which he did not think were in the best interests of how the case should be run, he would have told him that he needed to consider instructing alternative counsel. In relation to the number of times they had met before the trial, Mr Worrell said it was "way more" than twice, and that they had also spoken when there was a break.

16. I would refer at this point to two notes or letters which were produced at trial. Both had been written by the Appellant a relatively short time after the alleged rape. The first was addressed to the complainant and according to her evidence

was given to her by the Appellant during one of the incidents described by the complainant, when the Appellant had been present, first near to her school, and later after she had left school and was attending Teen Services. She described the Appellant as having been like a stalker on those occasions. She had given the letter to her mother and it (or a copy) had subsequently been given to the lawyer who was instructed in regard to obtaining a restraining order, of which more later. The complainant referred to the letter being like a love letter, because it talked of how the Appellant loved her as well as her sister. It also referred expressly to the fact that the complainant was "having our child", and to his jealousy when she went with others, specifically referencing one Gary by name. Interestingly, the Appellant's notes record that he did not remember writing any such letter to the complainant.

17. The second letter had been found by the complainant's relative years after it had been written. Its only relevance is that it constituted an admission that the Appellant had slept with the complainant, which confirmed what the relative had told the Police in her interview.

The Failure to put Various Matters to the Complainant in Cross-examination

18. The primary position maintained by the Appellant was that the complainant was lying about the rape because she had to justify having had a child by the Appellant, at a time when he was engaged to her relative. But there were many complaints of detail in regard to Mr Worrell's failure to run the case in accordance with the Appellant's instructions. In his affidavit in response Mr Worrell indicated that where he had not followed the letter of the Appellant's instructions, it was because he had made the decision not to pursue a particular matter for good reason. Generally, he said that he had discussed such areas where there was a difference of view with the Appellant, and the latter had accepted Mr Worrell's advice and agreed his approach to the case.

19. As might be expected, some of the alleged failures are more serious than others, and some are not made out. Starting with the failure to cross-examine regarding the complainant's need to justify the fact that she was pregnant by her relative's fiancé, the complainant had initially refused to tell anyone who the father of her child was, and then (after constant questioning by her mother), had told her mother of her rape by the Appellant. In consequence of this, her mother took matters further and had told a police officer, Stephen, who was a family friend. She similarly told the relevant facts to a lawyer, to whom the complainant was taken by her mother in connection with the securing of a restraining order. The complainant had, in her evidence in chief, given a very detailed account of the rape. If it had been suggested to her by Mr Worrell that she had made up the rape to avoid the stigma which would otherwise follow from the disclosure of the identity of the father, one can imagine what the response would have been. This is not to say that the question should not have been put, but to consider the potential effect of having done so. The complainant demonstrated throughout cross-examination a firm, even combative, approach to her questioning. At times she had put questions to counsel, and had directed him to "read the letter" when Mr Worrell had questioned the complainant regarding the securing of the restraining order, causing the judge to comment "What, she's running your case now?" It seems unlikely that putting this question would have elicited any different kind of response. The complainant had in her evidence in chief stated that she had not had sex with the Appellant on any of the three occasions which he had described in his Police statement, and had given her evidence as to how she became pregnant, i.e. in consequence of rape.

20. This is no doubt the appropriate time to refer to the first case relied upon by counsel in relation to counsel's negligence in failing to put crucial questions to the Crown witnesses, *Trott-Edwards v The Queen*, Criminal Appeal #s 14 and 20 of 2015. The Appellant's submissions in that case contended that the defendant's conviction for murder had been found to be unsafe due to a similar failure. In fact, the failure by counsel in *Trott-Edwards* to put material matters

to Crown witnesses was but the starting point of what was described by this Court in its judgment as “a regrettable series of errors”. The first of these was the aforesaid failure to put to prosecution witnesses an integral part of the defendant’s case, the same complaint as made in this case. But the second error was made by prosecuting counsel “in failing to engage with counsel for the defence who was trying to explain that the failure was not the defendant’s fault”, and the third was the judge’s “dictatorial attitude” in not being prepared to listen to counsel’s submissions in the absence of the jury. It was the combination of all three of these matters that led to the Court saying that thereafter the trial had proceeded on a false footing, and it was that false footing which led to the conviction being set aside as not safe, not merely the failure by counsel to put matters which formed part of his client’s case to the prosecution witnesses.

21. Next in terms of the Appellant’s complaints is the alleged failure to question the complainant about her relationship with the Appellant’s relative. To this complaint Mr Worrell said in his affidavit that it was true that he had made no application to adduce evidence of the complainant’s sexual history in order to call evidence about her relationship with him, but that those facts had been adduced via the Appellant’s relative’s own testimony. In fact, a question about the complainant’s relationship with the Appellant’s relative had been asked by Mr Worrell, and answered by the complainant, who explained when that relationship had started, which was not at the time Mr Worrell had suggested, but when her son had been three or four. The complainant also volunteered that they had had a daughter together. And Mr Worrell had asked in terms whether that relationship had begun when she was pregnant by the Appellant, to which the answer was in the negative, with the time of its commencement being repeated. Yet the submission is made that it was crucial to cross-examine the complainant about this, to test her credibility, and to suggest that she was sexually active at the time. In broad terms that was what was put to her, though perhaps not in as explicit terms as the Appellant might have wished. But the complainant had said in her evidence in chief that she was a virgin prior to the

alleged rape, and it seems to me doubtful that she would have given contradictory evidence if the matter had been pressed. It is true that the Appellant had in his notes referred to an allegation that the complainant had had sex with the Appellant's relative on her 16th birthday, in December 1988, but it appears from the judge's summation that the Appellant's relative's evidence was that he had been to a birthday party when the complainant was 17 or so, at which she had tried to seduce him. Given the evidence which the complainant had given, largely unsolicited, in one of her more combative responses, about when that relationship had started, it seems highly unlikely that further questioning would have been productive.

22. In regard to the complaint of a failure to ask about Gary, Mr Worrell had asked the complainant whether she had any boyfriend at the time, to which she had responded "No. Friends". The Appellant's affidavit said in terms that the complainant should have been asked what she meant by friends. I doubt if many advocates would have seen that as a productive question to put. But the same cannot be said for asking about Gary, who is mentioned in the letter referenced above. Whether that would have led to any different response about the complainant's sexual activity again seems to me doubtful in view of her earlier evidence.

23. The next complaint refers to a conversation said by the Appellant to have occurred in 2017, after the paternity test had established that the Appellant was indeed the father of the complainant's son. In a conversation between the complainant, the Appellant and their son, the Appellant contended that the complainant had said to him, in front of the son, that "we made a mistake". This was never put to the complainant, and given the inference that the Appellant sought, understandably, to be drawn from this, one can see no good reason why this question was not put. Neither apparently was the question raised with the son when he testified.

24. Then there is the issue of whether the complainant had said to the Appellant, as he alleges, that he was not the father of her child. This was a matter on which the judge understandably commented in his summation, and it appears in the notes prepared by the Appellant. This failure on Mr Worrell's part was described by the Appellant's counsel as a serious error. She submitted that it was difficult to understand how deciding not to put these questions could be of any strategic benefit to the Appellant and his defence. In the normal course, I would agree. But in this case it is to be noted that by the time Mr Worrell came to cross-examine the complainant, the Appellant's letter (which he had forgotten writing) was in evidence, and this letter included a reference made by the Appellant to the complainant "having our child". The evidence of the letter was therefore inconsistent with the Appellant's purported belief that the child was not his. Continuing to cross-examine on the basis of the previous instructions could be seen to be counterproductive.

Cross-examination on the Grounds of "Statutory Rape"

25. To put this matter in context, it is necessary to recall how the phrase came to be used. The complainant was being cross-examined in regard to her visit to the lawyer who had secured the restraining order, and she explained that she had told him what had happened. The lawyer had used the term "statutory rape", even though what had been described to him by the complainant was rape, and not unlawful sexual intercourse, an offence involving sex with a minor in respect of which absence of consent is not a necessary ingredient, otherwise colloquially known as statutory rape. It seems that the complainant may have misunderstood the term, but in any event Mr Worrell asked questions as to the complainant's understanding of the difference between "statutory rape" and the charge of rape being faced by the Appellant, which led the judge to sound a note of caution to Mr Worrell.

26. The Appellant made complaint about this line of questioning by Mr Worrell, who in his affidavit replying to the complaint, said that in his view it went to the heart of the case that the complainant had accepted that what was described by her at the material time had been referred to as statutory rape. Mr Worrell said, I think mistakenly, that the family friend, Stephen, to whom the complainant had recounted her story, after she had told her mother, had used the term statutory rape. That is inconsistent with the complainant's police statement, where she said that Stephen had told her mother "It's rape. Need to go see a lawyer".

27. In his evidence, Mr Worrell said that his point in raising the statutory rape point had been to establish that the sex, which the two unquestionably had, had been consensual. He intended to tie that issue in with the argument that the relatively courteous relationship which the two had had in later years was similarly consistent with that scenario. One can see why that argument might have been made, and it was not inconsistent with the Appellant's case; he maintained that there had been three instances of consensual sex, and that the rape as described by the complainant had not occurred. The three instances had of course been put to the complainant and she had denied them, but what was put to her was the Appellant's case.

The Failure to ensure that Witnesses were not present in Court when the Appellant gave his evidence

28. Mr Worrell accepted, as he was bound to, that he had made an error in not ensuring that the defence witnesses were not sitting in the public gallery when the Appellant gave his evidence. He suggested that these were not witnesses of fact so far as the rape itself was concerned, that the witnesses did not speak to the evidence of the Appellant, and that he did not think at the end of the day that there was prejudice.

29. However, the fact remains that the judge did make adverse comment. The real question to be considered is the nature of the evidence given by the witnesses in

question. In this regard we are hampered by the fact that the evidence of these witnesses was not transcribed. The only record of their testimony comes from the judge's summation, and he first dealt with the Crown contention that these witnesses had an interest to serve, namely to support and assist the Appellant. The judge focused on the Appellant's relative's evidence at this point, saying in terms that it was improper for the Appellant's relative to have sat and listened to the Appellant's evidence, particularly since the Appellant had maintained that the complainant was "a seducer", something to which the appellant's relative's evidence also spoke. Consequently, the Appellant's relative's evidence could not properly be described as being evidence which did not speak to the Appellant's evidence. Having said that, it is the case that the judge then gave the jury a caution in the usual general terms. In relation to the other defence witnesses, the judge referred only to the complainant's son, X, with particular reference to the conversation he had had with his mother, the complainant on, he said, his 18th birthday (his mother had said his 16th). The judge referred to the fact that X's evidence (that he did not believe his mother when she said she had been raped by the Appellant) was something the son was not in a position to speak to. One other witness was a general character witness, so the only defence witness of significance was the Appellant's relative. His evidence would have been the subject of an "interest to serve" caution in any event. But no doubt the judge's criticism of the failure to ensure that the Appellant's relative did not listen to the Appellant's evidence before giving evidence himself strengthened the degree of caution in the minds of the jury.

30. The last ground of appeal was concerning the cumulative effect of the various previous complaints, and in regard to these, it was said that while each ground taken on its own might not be enough to render the Appellant's conviction unsafe, viewed cumulatively, it was clear that the Appellant had not been afforded a fair trial, and that accordingly, the conviction should be quashed.

The Law on the Consequences of Counsel's Negligence

31. The starting point is the case of *R v Clinton* [1993] 2 All ER 998. In that case, the issue concerned a failure by the defendant to give evidence. In relation to tactical decisions made during the course of trial, the Court of Appeal said, at 1004 … "During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is calling his client to give evidence. … provided counsel had properly discussed the case with his client the court would not permit the defendant to have another opportunity to run an alternative defence which had not been run at trial." But "if the court had any lurking doubt that the defendant might have suffered some injustice as the result of flagrantly incompetent advocacy by his counsel, then it would quash the convictions". Ms Greening stressed that the course taken by Mr Worrell amounted to defiance of the Appellant's instructions made without reason or good sense.

32. The case of *R v Doherty and McGregor* [1997] 2 Cr App Rep 218 demonstrates the high threshold which has to be met in cases where an appeal is brought on the basis of allegations that counsel had disregarded a client's express instructions. In that case it was said that the precise complaint had to be spelt out with clarity in the grounds of appeal. The problem in this case is that many of the complaints in relation to how counsel conducted the case involve judgments to be made by counsel during the questioning of a strong witness who had already denied the premise of the question that the Appellant wished to have been put.

33. There were two authorities from this Court to which we were referred. The first was *Fox v The Queen* [2008] Bda LR 69, a case where the first ground of appeal was that the appellant had not been represented by competent counsel, and as a result was deprived of a fair trial. The Court reviewed the authorities, including the case of *R v Day* [2003] EWCA Crim 1060, where the court had considered

the relevant test to be “the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.” Given that the single test is that of safety, we would think it more appropriate to ask, in a case in which the alleged competence of counsel is the relevant ground of appeal, whether, as a result, the process was unfair and the verdict, in consequence, unsafe.

34. Last in this line of authorities was the case of *Sousa, Tucker and Simons v The Queen* [2010] CA (Bda) 16 Crim. Evans JA at paragraph 84 referred to the high demand placed on counsel where there were a number of co-accused and ‘cut-throat’ defences. He pointed out that “An added difficulty for after-the-event criticism of the way in which the defence was conducted is that both before and during the trial defence counsel have to make many strategic and tactical decisions in the advice they offer to their clients and as to the conduct of their trial. There is no formula for success. All advocates have their own individual styles. These are factors the Court has to bear in mind when considering allegations that the necessary standard of competence was not reached.” But it is clear that the test to be applied is the single test of safety, set out in *Day*, and adopted in *Fox*.

Application of the Law to this Case

35. There is potentially some conflict between the evidence of the Appellant and that of Mr Worrell as to how client and counsel had agreed that the case should be run. The Appellant said that after he had given his notes to Mr Worrell, the latter had told him that he had taken all of his advice into consideration. Particularly, the Appellant said that the plan agreed with Mr Worrell was to discredit the complainant, particularly with reference to the interaction there had been between the two at family occasions over the years, which the Appellant

maintained was inconsistent with the allegation of rape. Mr Worrell's version of events was that he and the Appellant had gone through the statement he had prepared, with the Appellant's notes, and he said that there were areas where he did not feel that the course suggested by the Appellant would be appropriate, that he had discussed these with the Appellant, and the latter had accepted his advice.

36. In broad terms I would accept Mr Worrell's evidence. It seemed to me that the Appellant overstated the lack of communication between the two. There were areas where the Appellant accepted he had not given instructions to Mr Worrell in respect of matters of which he had originally made complaint, for instance the allegation that the complainant had had an abortion in consequence of a sexual encounter with the Appellant's relative, a matter of complaint in the Appellant's affidavit, but which did not appear in the notes. The Appellant accepted that he had not given instructions to Mr Worrell concerning that allegation. Mr Worrell also stated that if the Appellant had refused to accept his advice, he would have suggested that he consider alternative counsel. But that is not the entirety of matters, because it is entirely possible that the two took a different view as to whether a particular course had been agreed, and the Appellant did not discover the manner in which Mr Worrell was departing from his instructions until the cross-examination of the complainant took a certain course. It nevertheless seems to me that the Appellant was being unrealistic in maintaining, for instance, the complaint as to Mr Worrell's failure to cross-examine the complainant on whether she had told the Appellant that he was not the father of her child. In light of the letter he wrote, such a course would have no doubt been unwise.

Conclusion

37. At the end of the day, the question for this Court is whether the alleged failures on Mr Worrell's part were sufficient to render the trial process unfair and the verdict of the jury unsafe. In my judgment neither of those matters has been

established in this appeal. The jury in reaching its verdict would no doubt have considered with care the critical question, which was whether they believed the complainant or the Appellant, and that question would be asked and answered without reference to the minutiae of how the cross-examination of the complainant was conducted. One of the features of the case was that there was no question but that the Appellant and the complainant had had sexual intercourse at the relevant time, so that a straightforward question for the jury was - whose version of how that sexual intercourse had occurred should they accept, the complainant's account of her rape at the family home or the Appellant's description of how he had had sex with the complainant on the three occasions which he maintained had occurred. There seems to have been no clear date given as to when the third occasion was, which is significant because the judge in his summation had understandably discounted the first two occasions described by the Appellant as having caused the pregnancy. In his Police interview the Appellant had said that he thought the complainant had found out that she had been pregnant in October, an impossibility given the conception date, but one which would have been consistent with the Appellant's mistaken recollection of his son's birthday as being late April rather than late June.

38. And while the jury would be well aware of the Appellant's case that he and the complainant had conducted themselves with civility towards each other over the years since the alleged rape, they would also no doubt bear in mind the complainant's evidence that she kept her participation in those family occasions which took place to a minimum because she felt uncomfortable on those occasions. No doubt they would also have been influenced by the terms of the letter written by the Appellant to the complainant in which he referred to the complainant "having our child" as compared with the comments made in his Police statement that he had doubts that the child was his.

39. All of those matters lead me inevitably to the conclusion that the process was not unfair to the Appellant, and the verdict was not unsafe. In my view the jury

would have reached the same verdict as they did even if Mr Worrell had conducted his cross-examination of the complainant just as the Appellant wished. I very much doubt that the complainant's evidence would have been materially different in those circumstances, or that the jury would have taken a different view of her or the Appellant's truthfulness. Accordingly I would dismiss the appeal.

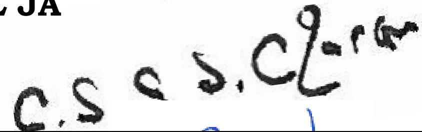
CLARKE P:

40. I agree.

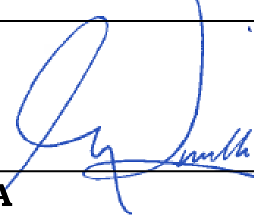
SMELLIE JA:

41. I also agree.

BELL JA



CLARKE P



SMELLIE JA